Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

IRVING D. ISKO,

Petitioner,

STATE OF NEW JERSEY,

Respondent,

v.

TERRANCE CARLSON and JEANETTE LEEHR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

DAVID SCHECHNER
SCHECHNER AND TARGAN
Attorneys for Petitioner
80 Main Street
West Orange, NJ 07052
(973) 325-2411

173695

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QUESTION PRESENTED

When defendants are convicted in a State's municipal court system, and a trial court of that State's Superior Court later reverses the conviction on purely legal grounds, and without any resolution of any factual element of the offense charged, must the determination of whether the Double Jeopardy Clause, Amendment V of the United States Constitution, precludes a further appeal on behalf of the State be based upon the reality of what actually happened in the acquitting court, or must the determination be based upon the theory of what could have occurred in the proceedings before the acquitting court, thus elevating form over substance?

PARTIES TO THE PROCEEDING

Terrance Carlson and Jeanette Leehr, defendants in the criminal action below, are not parties to this action.

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Petitioner Irving D. Isko respectfully petitions for a Writ of Certiorari to review the Judgment of the Superior court of New Jersey, Appellate Division rendered on October 29, 2001 in this case.

OPINIONS BELOW

The opinion of the Municipal Court of the Borough of Mendham, a municipal corporation of New Jersey, was entered on September 22, 1999. (Appendix ("Pet. App.") 27a to 40a). The action of The Honorable Peter Conforti, Judge of the Superior Court of New Jersey, Law Division, was rendered on May 22, 2000. (Pet. App. 41a to 58a; the court order appears at 56a). The action on the motion of Mr. Isko before The Honorable Reginald Stanton, Assignment Judge of the Superior Court of New Jersey, took place on June 30, 2000. (Pet. App. 13a to 24a; the court order appears at 23a). The opinion of the Superior Court of New Jersey, Appellate Division affirming the decision of Judge Stanton was rendered on October 29, 2001. (Pet. App. 1a to 23a). The decision is published at 344 N.J. Super. 521 (App. Div. 2001). The New Jersey Supreme Court declined to exercise discretionary review of the Appellate Division's judgment on February 6, 2002. (Pet. App. 25a). On that date, the Supreme Court of New Jersey also dismissed an appeal which had been filed in the matter.

STATEMENT OF JURISDICTION

The date when the Supreme Court of New Jersey entered the order which is sought to be reviewed is February 5, 2002. The date when the Superior Court of New Jersey Appellate Division entered the opinion sought to be reviewed here was October 29, 2001. The petitioner invokes this court's jurisdiction under 28 U.S.C. § 2101.

STATEMENT OF THE CASE

This Petition seeks review of a judgment of the Superior Court of New Jersey, Appellate Division rendered on October 29, 2001. By order dated February 5, 2002, the New Jersey Supreme Court declined to exercise discretionary review of the Appellate Division's judgment.

The Appellate Division's judgment warrants this Court's immediate review because the judgment conflicts with this Court's decisions on the application of the Double Jeopardy Clause. The refusal of the New Jersey Supreme Court to exercise its discretionary review of the Appellate Division's judgment deprives petitioner Irving D. Isko ("Petitioner") of any other recourse to vindicate the important federal rights at stake in this case.

This matter arises from the issuance of complaints in the municipal court of the Borough of Mendham (the "Borough")[1], charging defendants-respondents Terrance Carlson and Jeanette Leehr ("Defendants") with violating a municipal zoning ordinance. Defendants' property is in the Borough's 5-acre residential zone. The applicable zoning ordinance expressly prohibits all uses in the zone other than those specifically enumerated in the ordinance.

In early 1999, Defendants began boarding horses belonging to others on their property. The boarding of horses is not an enumerated permitted use under the zoning ordinance. The Borough's zoning officer became aware of the horse boarding in March 1999 and informed Defendants

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1. The Borough is a duly constituted municipality of the State of New Jersey.

that this activity was a violation of the zoning ordinance. When Defendants failed to comply with the ordinance, a summons was issued to each Defendant for the violation. The matter was then brought before the Borough's municipal court for trial.

Defendants entered into a stipulation of facts with the Borough's municipal prosecutor on the day of the trial. The stipulation was accepted into evidence by that court, and no testimony was taken. The municipal court found Defendants guilty of violating the zoning ordinance, and noted that a resident's keeping of horses that are not owned by the resident is horse boarding, which is not a permitted use.

Defendants then appealed the municipal court convictions to the Superior Court, Law Division in Morris County, New Jersey. The Borough attorney, not the municipal prosecutor, defended the Borough in the appeal. Although that appeal proceeding is denominated in the relevant New Jersey court rule as a *de novo* proceeding, the presiding judge, the Honorable N. Peter Conforti, refused to hear any presentation of evidence because the facts had been stipulated in the Municipal Court.

During the Law Division appeal, there was no presentation of evidence by either party. The transcript reflects that the entire appeal hearing consisted of only a brief colloquy between Judge Conforti and the Borough attorney, followed by the judge's decision to reverse the convictions. The reversal was based solely on Judge Conforti's interpretation of the applicable zoning ordinance: he noted that agriculture is an enumerated and permitted use under the zoning ordinance, and erroneously concluded that the

presence of the horses on Defendants' property constituted agriculture. Judge Conforti expressed his rationale thus:

> This particular case involves this property owner, Mr. Carlson having these horses on his property. And what are the horses doing besides being there? They're eating the hay and the grass. What does that involve . . . if not, an agricultural use with regard to this property?
>
> * * *
>
> The property owner is receiving the benefit of those horses eating what he's producing, which is clearly an agricultural use.

After Judge Conforti reversed the convictions, Petitioner, a complaining witness in the case, and his then-counsel, inquired of the Borough attorney's office whether the Borough intended to appeal the reversal. The response was that the Borough's governing body had decided not to appeal.

Petitioner then filed an application before the Honorable Reginald Stanton in the Law Division of the New Jersey Superior Court to appoint his attorney as a private prosecutor to carry forward the appeal of Judge Conforti's order reversing the convictions. Such appointments are permitted by long-established New Jersey court rules.[2] Judge Stanton

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2. New Jersey's court rules provide that, in municipal court matters, the Court may permit a private prosecutor to represent the government. Rule 7:8-7(b). In addition, in any appeal to the Superior Court from courts of limited jurisdiction, with the court's consent, "the attorney for a complaining witness or other person interested in the prosecution may be permitted to act for the prosecuting attorney." Rule 3:23-9(d).

denied Petitioner's motion on the ground that even though the facts had been previously stipulated and were not tried before Judge Conforti, a finding of fact was implicit in Judge Conforti's consideration of those stipulated facts when Judge Conforti reversed Defendants' convictions on purely legal grounds. Petitioner appealed that denial to the Appellate Division.

On October 29, 2001, the Appellate Division, affirming Judge Stanton's order, held that the appeal of Judge Conforti's reversal of Defendants' convictions was barred by double jeopardy, and that therefore, Petitioner's application to privately prosecute that appeal was properly denied.

Petitioner filed both a Notice of Petition for Certification and a Notice of Appeal with the New Jersey Supreme Court on November 19 and 27, 2001, respectively. By order dated February 6, 2002, the New Jersey Supreme Court denied the petition for certification and dismissed the appeal without opinion.

Both Judge Stanton and the Appellate Division erroneously concluded that the Double Jeopardy Clause, Amendment V of the United States Constitution, precludes the prosecution of an appeal of Judge Conforti's reversal of the convictions. Underlying this erroneous conclusion of law by both courts is the finding by Judge Stanton that double jeopardy inhered because Judge Conforti had made findings of fact in his disposition of Defendants' appeal of their convictions, even though the record reflects that Judge Conforti refused to make any such findings. Both Judge Stanton and the Appellate Division elevated form over substance by relying on the *rule* designation of the proceeding as *de novo* rather than reviewing and relying upon the record

of that brief proceeding to determine its true character. The record unequivocally demonstrates that Judge Conforti made no finding of fact, but instead made a purely legal determination, when he construed a statute based on facts that had been stipulated in the municipal court below. There is nothing in the record to establish that Judge Conforti made findings of fact when he reversed the Defendants' convictions.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the judgment at issue creates a precedent within New Jersey which constitutes a departure from, and conflicts with, this Court's well-established jurisprudence on the Double Jeopardy Clause, Amendment V of the United States Constitution. Such a departure will have far-reaching implications on criminal and quasi-criminal proceedings in New Jersey, and will create inconsistency, doubt, and confusion. Because the New Jersey Supreme Court has declined to review the case, this important issue of federal rights should be addressed by this Court.

The Judgment of the Appellate Division Creates a Precedent Within New Jersey Which Conflicts with This Court's Well-Established Jurisprudence on the Double Jeopardy Clause.

The Appellate Division's invocation of double jeopardy principles to foreclose any appeal of the Order reversing Defendants' convictions is patently erroneous. Both the Appellate Division and Judge Stanton mischaracterized the nature of the earlier review of the convictions by Judge Conforti, which entailed a purely legal determination, albeit an erroneous one. Both Judge Stanton and the Appellate Division then adopted an interpretation of double jeopardy case law that is untenable.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court explained that double jeopardy bars the State's appeal from an acquittal if the ruling of the judge being appealed actually represents a decision which resolves, correctly or not, some or all of the factual elements of the offense charged. *Id.* at 571. A post-verdict ruling of law, however, is analogous to an appellate court's dismissal of an indictment, which the government has an undisputed right to appeal. *See United States v. Wilson*, 420 U.S. 332, 345 (1975). Consequently, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting the defendant to a second trier of fact. *Id.*

In the instant matter, no witnesses were ever sworn and no witnesses ever testified. In lieu of testimony, the parties had stipulated to all the facts during the initial proceeding in the municipal court. The record reflects that, in the Law Division's review of the municipal court convictions, Judge Conforti took no testimony and refused to make any findings of fact because he was bound by the stipulation. He did nothing more than discuss the Mendham ordinance in the context of the stipulated facts which constituted the findings of fact of the municipal court which convicted the defendants. A review of the transcript of proceedings clearly confirms this:

> THE COURT: . . . The problem that Mendham has, in my judgment, is the stipulation of facts that they presented, which is the record that the Court has to go on here.
>
> * * *

> THE COURT: . . . I'm not going to speculate on what the hearing would have produced by way of testimony. All I'm indicating to you though is my interpretation of the ordinance from these [stipulated] facts. . . . [Pet. App. 52a to 54a].

See also Pet. App. 43a, 46a to 47a, 48a to 51a, 53a to 54a. Thus, the reversal of the convictions did not constitute an acquittal based upon a resolution of any factual element of the matter. The proceeding before Judge Conforti was a reversal of the convictions on purely legal grounds which, for double jeopardy purposes, is regarded as an appellate matter and subject to further review.

In *United States v. Wilson*, 420 U.S. 332 (1975), a jury convicted the defendant of embezzlement. After the verdict and upon defendant's motion, the trial judge dismissed the indictment on an issue of law. The government appealed and the defendant argued that the appeal was precluded by the Double Jeopardy Clause. This Court disagreed, noting that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345.

Judge Conforti's decision, when considered in light of *Wilson*, was not an acquittal but was an appellate reversal of the convictions based solely on a conclusion of law. Thus, the appeal to the Appellate Division in the matter now before this Court did not and does not present a risk of a second trial. The facts below were established by a stipulation entered into and accepted into evidence by the municipal court which convicted the defendants. There is no implication of double jeopardy by virtue of Petitioner's appeal seeking a reversal on purely legal grounds.

The Appellate Division, to support its affirmance of the denial of Petitioner's motion to appoint a private prosecutor, noted that the Law Division proceeding before Judge Conforti, under Rule 3:23-8 of New Jersey's court rules, was *de novo*. Rule 3:23-8 is the rule which permitted, but did not require, Judge Conforti to make a finding of fact in that proceeding. At the heart of the Appellate Division's decision is the conclusion that

> . . . this case is barred by principles of double jeopardy because jeopardy attached when the case was submitted on stipulated facts and terminated in favor of defendants by the fact finder in a trial *de novo* based upon a determination that the defendants were innocent or not guilty.

However, the record of the Law Division proceeding indicates that the case was not submitted on stipulated facts to the court which found defendants *not guilty* but rather to the court which found defendants *guilty*. The Appellate Division opinion does not cite to any fact finding by Judge Conforti that provided the basis for reversing that guilty determination. Indeed, Judge Conforti refused to make such findings. The Appellate Division simply concludes that the proceeding before Judge Conforti is labeled "*de novo*" by the Rule. The Appellate Division does not contradict the point that, in fact, the so-called *de novo* trial did not involve any fact finding because Judge Conforti explicitly ruled that there would not be any fact finding, and that the proceeding would address only the law applicable to the facts as stipulated in the lower court which rendered the guilty verdict.

The proceeding before Judge Conforti was not a trial *de novo*, but, rather, an appeal. Judge Conforti refused to

make any findings or draw any inferences, and rendered only a brief determination. The two opinions of this Court cited by the Appellate Division as to the character of the proceedings are distinguishable, as each involved a plenary hearing *de novo*, which was not the case in the matter before this Court. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 297 (1984), and *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 105-106 (1972).

The Appellate Division relied on *Finch v. United States*, 433 U.S. 676 (1977), to support its assertion that an appeal from a dismissal based on stipulated facts is barred. In *Finch*, the defendant was charged with violating a federal statute and the case was submitted to the district court on stipulated facts. 433 U.S. at 676. The district court dismissed the charges for failure to state an offense based on the stipulation of facts and its interpretation of the governing treaty. The government appealed to the Ninth Circuit Court of Appeals, which reversed the dismissal on the grounds that the only determination to be made, the interpretation of the treaty, was a legal one, and that no further factual proceedings would be required. Holding that double jeopardy barred the government's appeal to the Ninth Circuit, this Court reversed. *Id.* at 677. Despite the Appellate Division's insistence that the holding in *Finch* bars an appeal, *Finch* is entirely distinguishable because in *Finch* there was no finding of guilt in the first instance, whereas here, Defendants were convicted in the first instance by the municipal court.

The Appellate Division also cited *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Scott*, 437 U.S. 82 (1978); and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) to support its erroneous conclusion that an appeal of the order reversing Defendants' convictions was barred by double jeopardy. These cases are also distinguishable.

Jenkins and *Martin Linen* involved a dismissed indictment and an acquittal under Rule 29(c) in the first instance whereas the Defendants in the matter before this Court were convicted in the first instance. The *Jenkins* court held that the government's appeal was barred by double jeopardy because further proceedings "devoted to the resolution of factual issues going to the elements of the offense charged" would have been required had the government's appeal been successful. 420 U.S. at 370. As stated above, no such resolution of factual issues would be required in the instant case.

In *Scott*, which overruled *Jenkins*, this Court held that double jeopardy principles are not violated when the government appeals to seek reversal of a mid-trial termination of proceedings favorable to the defendant that is unrelated to factual guilt or innocence of the offense of which he is accused. 437 U.S. at 98-99. Thus, the Appellate Division wrongly determined that the case at bar "embodies a disposition which *Scott* (as well as *Jenkins*) would preclude the State from appealing." None of the cited cases are applicable.

In sum, the Appellate Division erred when it concluded that double jeopardy barred Petitioner's appeal of the order reversing Defendants' convictions. This error requires the Court's consideration so that the Appellate Division's decision will not serve as a precedent to perpetuate misapplication of the Double Jeopardy Clause in New Jersey.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID SCHECHNER
SCHECHNER AND TARGAN
Attorneys for Petitioner
80 Main Street
West Orange, NJ 07052
(973) 325-2411

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED AND FILED OCTOBER 29, 2001

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
A-5899-99T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRANCE CARLSON and JEANETTE LEEHR,

Defendants-Respondents.

IRVING D. ISKO,

Appellant.

Argued telephonically Sept. 21, 2001

Decided Oct. 29, 2001

Before Judges Stern and Eichen.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal Docket No. 99-074.

* * *

Appendix A

The opinion of the court was delivered by STERN, P.J.A.D.

Irving D. Isko, designated "a person interested in the prosecution," purports to appeal from an order of June 30, 2000, denying his request for appointment as "Special Municipal Prosecutor" to appeal the defendants' successful disposition of their municipal appeal to the Law Division and "reversal" of the municipal convictions. Isko argues that "the application to intervene as private prosecutor met all the requirements" of law and should have been granted; its denial constituted "an abuse of discretion"; there is no double jeopardy prohibition precluding the appeal of the Law Division's reversal of defendant's conviction in municipal court, and "an important public interest" would be promoted were the appeal permitted to go forward.

Defendants were found guilty in the Mendham Municipal Court of violating a zoning ordinance, Art. IV, Sec. 215-13, which appellant believes proscribes the boarding of horses as a commercial use or "commercial enterprise" in a five acre zone. They were each fined $50 and ordered to pay $25 in court costs. Each was also directed by the municipal court judge to "remove" the horses from the property within ninety days.

The ordinance provides, in part:

§ 215-13. Uses permitted.

In the 5-Acre, 3-Acre, 1-Acre and 1/2-Acre Residence Zones, no building or land shall be used

and no building or structure shall be erected, constructed, reconstructed, altered or repaired which is arranged, intended or designed for any use or occupancy except for the following:

A. One single-family dwelling per lot which shall include any use of single-family dwellings protected by statute. **[Amended 6-15-1998 by Ord. No. 14-98]**

B. Playgrounds and parks.

C. Agricultural uses.

D. Home Occupations.

E. Accessory uses.

F. Conditional uses.

The ordinance further defines "agriculture" as follows:

AGRICULTURE — The growing of crops; raising or breeding of horses, sheep, dairy, poultry or other farm livestock; orchard, woodlot, reforestation, nursery or greenhouses; or other agricultural purposes. "Agricultural land" shall include open or wooded areas, ponds, brooks, swamps and meadows.

Appendix A

The complaint was signed by the Mendham zoning officer and was prosecuted by the Mendham municipal prosecutor based on stipulated facts.[1] The "stipulations" of fact were as follows:

> 1. Since June 1998, defendants have been the owners and residents of property located as 135 Talmadge Road, Mendham Borough, New Jersey ("property"). Defendants are husband and wife.
>
> 2. The property consists of approximately 12 acres constituting two separately shown parcels on the Mendham Borough Tax Map as Lot 5.01 and Lot 5 in Block 2101.
>
> 3. Lot 5.01 is 5.004 acres in size and contains a barn and fenced-in pasture area that existed at the time defendants purchased the property. The barn is designed for the keeping of horses, and is several decades old.
>
> 4. Lot 5, consisting of 6.92 acres, has structures including a residential house, a carriage house, and a garage.
>
> 5. The property is located within a 5 Acre Residential Zone as that Zone is defined under Mendham Zoning Ordinance § 215-13.

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1. We do not comment herein on the propriety of a trial on stipulated facts in the manner done here. *See generally In re T.M.*, 166 *N.J.* 319 (2001).

6. Defendants currently have four horses on the property. Defendants do not own the horses. The horses are owned by Maribeth Thomas.

7. The horses are allowed to remain at the barn free of charge. However, their owner does reimburse defendants for grazing and haying at the property for approximately $700 per year to the extent that the horses do eat the grass and hay found at the property.

8. Defendants have recently filed a Farmlands Assessment Act application for exemptions. In their application, defendants assert the sale of $2,600 in eligible agricultural products.

9. Attached hereto as Exhibit "A" are five letters constituting the entirety of communications between defendants and the Mendham Borough Zoning Officer, which preceded the complaint, as pertained to the nature of allegations that defendants' keeping the horses at the property is allegedly a violation of the Mendham Zoning Law.

Defendants' trial *de novo* in the Law Division was prosecuted by the Mendham Borough Attorney. The Law Division judge found defendants were engaged in "an agriculture use," not "boarding of horses," and found defendants not guilty.[2] He concluded:

2. The judge said he "reverse[d] the conviction," although the trial was *de novo*. *See R.* 3:23-8(e). New Jersey's two-tier system generally requiring *de novo* fact-finding on the record, *R.* 3:23-8(a), (Cont'd)

> THE COURT: The property owner is receiving the benefit of those horses eating what he's producing, which is clearly an agricultural use.

The State determined "not [to] pursue an Appeal." Isko's counsel then filed a motion in the Law Division, seeking an order permitting his counsel "to act as the Municipal Prosecutor" in order to file an appeal in this court. In denying the application, Judge Reginald Stanton concluded that:

> This case is a quasi-criminal proceeding. In constitutional terms, it's a criminal proceeding, period, which originated in the Municipal Court, in the Borough of Mendham. There was a conviction obtained in the Borough of Mendham. Thereafter, there was an appeal taken by the defendants from that conviction and the appeal brought the case to the Law Division of the Superior Court where there was not an appeal in the normal sense, in the normal Appellate Law sense conducted, but there was instead a trial de novo on the record below. So the Superior Court Judge in the Law Division who heard the case dealt directly with the facts and made original findings and original inferences with respect to them.

(Cont'd)

is unique in many respects. *See, e.g. Justices of Boston Municipal Court v. Lydon,* 466 *U.S.* 294, 104 *S. Ct.* 1805, 80 *L. Ed.* 2d 311 (1984); *Colten v. Commonwealth of Kentucky,* 407 *U.S.* 104, 92 *S. Ct.* 1953, 32 *L. Ed.* 2d 584 (1972).

Appendix A

. . . .

> There is also another thing to be kept in mind, there are facts and there are inferences from facts. And inferences grown from facts are fact-finding. And in this case, Judge Conforti sitting in the Law Division drew certain inferences from the facts which were stipulated and which he accepted, and those inferences resulted in a factual finding that the ordinance had not been violated.
>
> . . . .
>
> The State cannot appeal because of constitutional prohibitions on double jeopardy from a finding of innocence based upon an interpretation of the facts in a criminal case. It is true that there are certain circumstances where a Court, where an appeal can be taken by the State in a criminal case, but those instances are very limited. They are set forth in Rule 2:3.1;. . . .
>
> . . . And all of the other instances where the State can appeal do not involve a case where the Court, sitting as a trier of fact makes a determination adverse to the State on the merits of the case. And that is what has occurred here. So it is simply not appealable.

Judge Stanton alternatively noted that the prosecutor has the discretion to prosecute a quasi-criminal matter, and that the decision not to appeal was part of the exercise of that discretion by a public official. He said:

> Now, in this case, we did not have a public prosecutor who took an inappropriate hands-off view and said, we just don't do citizens' complaints. The Prosecutor did take this case. The Prosecutor prosecuted the case at the Municipal Court level, and when an appeal was taken from that, the Public Prosecutor prosecuted the case at the Law Division level. And when that ended with the decision adverse to the State, the Public Prosecutor decided not to go any farther for two reasons, first, because he correctly concluded that there's no such thing as appealing something like this; but, secondly, he concluded, after consulting with the public entity involved; namely, the municipal governing body, that it was not in the public interest to pursue this matter any further, even if it were pursuable. That kind of decision is one that should never be disturbed by a court.

Finally, Judge Stanton suggested that *State v. Storm*, 141 *N.J.* 245 (1995) (and *R.* 7:8-7(b)) did not apply to the initial appointment of a "special prosecutor" after defendant's successful trial *de novo*. He said:

> The case is not appealable and even if it were appealable, this is not a situation where a private prosecutor is appropriate because a public prosecutor has become involved in the case and has made a decision in the public interest with respect to this case. Not a hands-off decision, but a hands-on justice-oriented decision that the case should not go forward.

We need not decide whether a "private" or "special prosecutor" can be substituted after a defendant's successful appeal to the Law Division. *See R.* 3:23-9 regarding municipal appeals to the Law Division. Nor need we decide if *R.* 7:8-7(b) can be implemented for the first time on appeal after the State's attorney declines to pursue the matter, or whether a disposition of a non-indictable "quasi-criminal" matter favorable to a defendant on grounds which do not preclude appeal as a matter of constitutional law is cognizable in this court under our rules of practice and procedure.[3] The parties agree that these issues are academic if the doctrine of double jeopardy would preclude an appeal in this case from the Law Division judgment, and we so conclude.

In *State v. Barnes*, 84 *N.J.* 362 (1980), the Supreme Court applied federal double jeopardy principles to the appealability of a non-indictable offense following the disposition of a trial *de novo*. *See Barnes*, *supra*, 84 *N.J.* at 367-72; *State v. Costello*, 224 *N.J. Super.* 157 (App. Div.), *certif. denied*, 111 *N.J.* 596 (1988). *See also, e.g.*, *United States v. Scott*, 437 *U.S.* 82, 98 *S. Ct.* 2187, 57 *L. Ed.* 2d 65 (1978) (appeal permitted where disposition during trial not related to guilt or innocence); *Sanabria v. United States*, 437 *U.S.* 54, 98 *S. Ct.* 2170, 57 *L. Ed.* 2d 43 (1978) (erroneous exclusion of evidence resulting in acquittal non-appealable). Because

3. *R.* 3:24(b) permits the State to appeal to the Law Division from final judgments in certain instances. That rule does not employ language similar to *R.* 2:3-1, which essentially permits appeals co-extensive with double jeopardy preclusions. *See State v. Lefkowitz*, 335 *N.J. Super.* 352 (App. Div. 2000), *certif. denied*, 167 *N.J.* 637 (2001). Moreover, *R.* 2:3-1, permitting appeals by the State in "criminal action[s]," does not include specific reference to quasi-criminal or ordinance violations.

an ordinance prosecution in New Jersey is subject to double jeopardy protection, and our state constitution is co-extensive with the federal constitution with respect to multiple prosecutions, *see, e.g., State v. Barnes, supra*, 84 *N.J.* at 370, this appeal is precluded by principles of double jeopardy.

There is no doubt that this case involving an ordinance violation, commenced on municipal court summons and in which the State acknowledged its burden beyond a reasonable doubt, is a quasi-criminal matter. *State v. Schad*, 160 *N.J.* 156, 171 (1999); *State v. Barnes, supra*, 84 *N.J.* at 365; *State v. Yaccarino*, 3 *N.J.* 291, 295 (1949); *State v. Weir*, 183 *N.J. Super.* 237, 241-43 (App. Div. 1982); *see also State v. Widmaier*, 157 *N.J.* 475, 489-500 (1999). Thus, because the Law Division concluded the matter on the merits in favor of defendants, and an appeal by the State is precluded, *State v. Widmaier, supra*, 157 *N.J.* at 491; *State v. Barnes, supra*, 84 *N.J.* at 371; *State v. Gerstmann, 198 N.J. Super.* 175, 179-80 (App. Div. 1985), the question of Isko's right to pursue the appeal became academic.

Appellant argues that because there was a stipulation of facts, there is no need upon reversal for a "new trial" before a fact-finder. Appellant also contends that there is no jeopardy preclusion because the municipal appeal was not really "*de novo*" and the legal question can be decided on the stipulated facts without a "retrial."

United States v. Wilson, 420 *U.S.* 332, 95 *S. Ct.* 1013, 43 *L. Ed.* 2d 232 (1975), allows the government to appeal when a reversal would not require a retrial, and *Wilson* applies

to bench trials, *United States v. Rose*, 429 *U.S.* 5, 97 *S. Ct.* 26, 27, 50 *L. Ed.* 2d 5, 7 (1976); *United States v. Morrison*, 429 *U.S.* 1, 3, 97 *S. Ct.* 24, 26, 50 *L. Ed.* 2d 1, 4 (1976).[4]

But this case is nevertheless barred by principles of double jeopardy because jeopardy attached when the case was submitted on stipulated facts and terminated in favor of defendant by the fact-finder on trial *de novo*, based on a determination that defendant was innocent or not guilty. *Barnes*, *supra*, 84 *N.J.* at 371-72. *See also Finch v. United States*, 433 *U.S.* 676, 677, 97 *S. Ct.* 2909, 2910, 53 *L. Ed.* 2d 1048, 1050-51 (1977), which barred an appeal from a dismissal based on stipulated facts. The ruling here "whatever its label, actually represents a resolution [by the fact-finder], correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 *U.S.* 564, 571, 97 *S. Ct.* 1349, 1355, 51 *L. Ed.* 2d 642, 651 (1977).

We recognize that *Finch* may be outdated with respect to appealability when the disposition in the trial court is not related to fact-finding or guilt or innocence.[5] Nevertheless,

4. The appeals in *Morrison* and, by reliance on *Morrison*, *Rose* were dismissed based on *United States v. Jenkins*, 420 *U.S.* 358, 95 *S. Ct.* 1006, 43 *L. Ed.* 2d 250 (1975). *See* footnote 5, *infra*, regarding the impact of the overruling of *Jenkins* by *United States v. Scott*, *supra*, 437 *U.S.* at 87, 98 *S. Ct.* at 2192, 57 *L. Ed.* 2d at 71.

5. *Finch* was decided before *Scott* "overruled" *United States v. Jenkins*, 420 *U.S.* 358, 95 *S. Ct.* 1006, 43 *L. Ed.* 2d 250 (1975), which precluded appeals from dispositions during trial in situations which *Scott* would now permit. *See Scott*, *supra*, 437 *U.S.* at 101,

(Cont'd)

Finch must still be read for the proposition that jeopardy attaches when a case is submitted on stipulated facts. *See United States v. Finch*, 548 *F.*2d 822, 824-25 (9th Cir. 1976), *vacated on other grounds sub nom. Finch v. United States*, *supra*, 433 *U.S.* 676, 97 *S. Ct.* 2909, 53 *L. Ed.* 2d 1048 (1977). Accordingly, when a trial judge decides a case submitted on stipulated facts based on evidentiary insufficiency or innocence, it is not appealable. *Gooding v. Stotts*, 856 *F. Supp.* 1504, 1508 (D. Kan. 1994), *aff'd*, 54 *F.*3d 787 (10th Cir. 1995).

We share Judge Stanton's concerns regarding whether *R.* 7:8-7(b) would permit the substitution of private counsel for the first time after an unsuccessful municipal appeal and whether such substitution should be permitted to prosecute appeals to or from the Law Division when the appropriate prosecuting attorney exercises his discretion and concludes that an appeal is unwarranted. In light of our disposition, however, we need not pursue the question.

The judgment is affirmed.

(Cont'd)

98 *S. Ct.* at 2199, 57 *L. Ed.* 2d at 80-81. However, this case embodies a disposition which *Scott* (as well as *Jenkins*) would preclude the State from appealing. *See generally United States v. Scott*, *supra*, 437 *U.S.* 82, 98 *S. Ct.* 2187, 57 *L. Ed.* 2d 65 (1978); *United States v. Jenkins*, *supra*, 420 *U.S.* 358, 95 *S. Ct.* 1006, 43 *L. Ed.* 2d 250 (1975). While we agree with the Seventh Circuit that "*Scott* overruled *Finch* along with *Jenkins*," *United States ex rel. Young v. Lane*, 768 *F.*2d 834, 839 (7th Cir. 1985), that fact relates to appealability, not whether jeopardy attached with the disposition upon stipulated facts.

APPENDIX B — COURT DECISION OF MOTION FOR REQUEST FOR LEAVE FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY, CRIMINAL PART DATED JUNE 30, 2000

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
CRIMINAL PART
MUNICIPAL APPEAL B000055, B000056
APPEAL NO. 99-074
APP. DIV. NO.

THE STATE OF NEW JERSEY,

Complainant,

vs.

TERRANCE CARLSON and JEANETTE LEEHR,

Defendants.

TRANSCRIPT OF MOTION FOR REQUEST FOR LEAVE

Place: Morris County Courthouse
Washington and Court Streets
Morristown, New Jersey

Date: June 30, 2000

BEFORE:

HONORABLE REGINALD STANTON, A.J.S.C.

Appendix B

TRANSCRIPT ORDERED BY:

SCHECHNER & TARGAN, P.C.

APPEARANCES:

SCHECHNER & TARGAN, P.C.
BY: DAVID SCHECHNER, ESQ.,
Attorney for Mr. Isko.

JANSEN, BUCCO & DE BONA,
BY: FRED SEMRAU, ESQ.,
Attorney for the Municipality.

POST, POLAK, GOODSELL & MAC NEILL, P.A.,
BY: DAVID L. EPSTEIN, ESQ.,
Attorney for the Defendant.

[19] * * *

THE COURT: Thank you. Just bear with me a moment. I want to check something.

I'm going to deny the motion to appoint Mr. [20] Schechner as the person to prosecute an appeal of this case.

This case is a quasi-criminal proceeding. In constitutional terms, it's a criminal proceeding, period, which originated in the Municipal Court, in the Borough of Mendham. There was a conviction obtained in the Borough of Mendham. Thereafter, there was an appeal taken by the defendants from that conviction and the appeal brought the case to the Law

Division of the Superior Court where there was not an appeal in the normal sense, in the normal Appellate Law sense conducted, but there was instead a trial de novo on the record below. So the Superior Court Judge in the Law Division who heard the case dealt directly with the facts and made original findings and original inferences with respect to them.

Mr. Schechner has indicated that the Court really shouldn't be regarded as so much as a fact-finder in this case because there was a stipulation of facts. I would point out that in any case, there's no such thing as a stipulation of facts binding on the Court, whether it's a civil case or a criminal case. The Court must agree to accept the stipulation of facts. And that decision to accept a stipulation of facts is in itself a fact-finding. It's a finding that [21] it is broadly accurate under all of the circumstances to accept the facts that the parties propose and stipulate between themselves.

I sometimes sitting as — I've never had stipulations of facts in a criminal case, I don't think, but I have had them often in civil cases. And sometimes I've declined to accept them because I don't think they are broad enough or accurate enough to capture what is at issue in the case.

And, certainly, when it comes to accepting stipulations of fact in a criminal case, the Court cannot accept stipulations simply because both sides agree that these are the facts. The Court has to take a critical look at what is proposed in deciding whether it will accept the stipulation of facts.

There is also another thing to be kept in mind, there are facts and there are inferences from facts. And inferences

grown from facts are fact-finding. And in this case, Judge Conforti sitting in the Law Division drew certain inferences from the facts which were stipulated and which he accepted, and those inferences resulted in a factual finding that the ordinance had not been violated.

Now it's conceivable, of course, he may have been wrong in that regard. I have not read the [22] underlying record of the case before him in connection with this motion, so I don't know whether I agree with the finding that Judge Conforti made or not. It's really irrelevant. There's no need for me to look at that. There's no need for me to make findings of my own. So when I say it's conceivable that he made a mistake, I don't mean that to suggest that I looked at the record and I have doubts about the soundness of his judgment. I'm just simply saying that, like all of us, he can sometimes make a mistake. So he may have made a mistake in this case. That is certainly conceptually open to consideration. But mistakes in reaching judgments based upon the fact are not subject to appeal in a criminal case where the alleged mistake in judgment favors the defendant.

The State cannot appeal because of constitutional prohibitions on double jeopardy from a finding of innocence based upon an interpretation of the facts in a criminal case. It is true that there are certain circumstances where a Court, where an appeal can be taken by the State in a criminal case, but those instances are very limited. They are set forth in Rule 2:3.1; and that rule says, quote, in any criminal action, the State may appeal, or where appropriate, seek leave to appeal.

[23] It goes on to say, to the appropriate Appellate Court from one, a judgment of the Trial Court dismissing an indictment, accusation, or complaint where not precluded by the Constitution of the United States or of New Jersey; two, an order of the Trial Court entered before trial in accordance with Rule 3:5 dealing with search warrants; three, a judgment of acquittal entered in accordance with Rule 3:18-2 which is a judgment against a verdict, notwithstanding the verdict following a jury verdict of guilty; four, a judgment in a postconviction proceeding collaterally attacking a conviction or a sentence; five, an interlocutory order entered before, during, or after a trial; or, six, as otherwise provided by law.

There is no "as otherwise provided by law" applicable in this case. And all of the other instances where the State can appeal do not involve a case where the Court, sitting as a trier of fact makes a determination adverse to the State on the merits of the case. And that is what has occurred here. So it is simply not appealable.

Now that actually disposes of the case, but if one is a Trial Judge, one always has to be concerned that there may be an Appellate review of one's decision, and it's conceivable that — hard for me to [24] conceive, I must say, but I'm going to say humility forces me to admit that it is possible that an Appellate Court might find I was wrong in the ruling just made. I'd be terribly surprised if one did, but if one — in case one does, I think something has to be said about other parts of this case. And that is, that even if this case were appealable on the part of the State, so the State could still do something more, there should not be the appointment of private counsel to undertake those further proceedings.

And one fundamental reason for that is, that this is not a case in which the Public Prosecutor has said we're not interested in the case, we don't handle this kind of case. You handle it yourself, if you want to. There are instances of that still occurring, very unfortunately, I might say, in municipal courts. In my judgment, it really would be the appropriate rule not to allow any criminal conviction, any criminal prosecution unless it is undertaken by a public prosecutor.

The reason for that, there are two reasons for that. One is, I think it's simply an oxymoron to speak about a private prosecution of the public criminal law. Criminal law is public. The decision to move is a decision made on behalf of the State. And it [25] should only be made by a public official who is accountable to the State in a structured legal way.

We had the development of allowing private prosecutors in municipal courts going back to English days when there were no public police forces, and there were no public prosecutors, and we carried it over into New Jersey; and for a long time we did not have public prosecutors at the Municipal Court level. Now we do. And those prosecutors should do the public business and nobody else should do the public business, it seems to me.

Municipal prosecutors should not be allowed to say, I don't prosecute citizen complaints, I only prosecute police complaints. That's not appropriate. And it's wrong. And that doesn't mean that a municipal prosecutor should prosecute every complaint a citizen brings to them. It means that if the citizen comes with a legitimate complaint that has some probable cause attached to it and some merit plausibly

attached to it, that municipal prosecutors should prosecute it, no matter whether it comes from a police officer or a private citizen, but absolutely indispensable to the fair administration of criminal law is the decision not to prosecute as a matter of principle.

I'm not talking about the decision not to [26] prosecute because we're not bothering with private citizens' complaints, it's the — which is not what we have here. But you have to keep in mind that criminal law, both at the State level, in terms of State statutes and at the local level, in terms of the myriad of municipal ordinances which are involved, involves enormously intricate bodies of law, and it involves always laws that can technically be used to justify a prosecution which simply ought not to be brought on all kinds of fairness grounds.

And the reality is and I can tell you because every time the Prosecutor decides to administratively dismiss a case in either Morris or Sussex County, I'm speaking now of cases that come to the Prosecutor for prosecution in the Superior Court, when, of course, we know that only the Prosecutor can prosecute, the Public Prosecutor. The County Prosecutor or the Attorney General are the only persons who can prosecute violations of State statutory law, criminal in the Law Division of the Superior Court.

But every month, the Public Prosecutor declines to prosecute scores and scores and scores of cases because he determines that the evidence is insufficient or that the matter is fundamentally a Civil or Family Court matter, even though, technically, [27] there might be a violation of the criminal

law. Or he decides, because all things considered, the violation was mostly technical and didn't involve any real public interest. And in these days where all kinds of conduct is theoretically subject to being characterized as criminal, it's absolutely essential to the liberty of our citizens that only responsible public officials can decide to put a citizen to the burden of having to defend a criminal charge against him.

I must say I'm incredibly disappointed when the Supreme Court decided the Storm case, although it got almost to the point of saying, what I've just said, it ended up falling far short of that. I'm disappointed. I think it was a fundamental mistake of policy. I think it was a fundamental loss of an opportunity to promote a liberty value. But the fact still is, no matter what anybody says, the critical — it's a critical part of the whole prosecutorial process that the Prosecutor can look at a situation, assess its common sense, assess the public interest, and say, no, this case is not worth prosecuting. It is not in the sense that it's unimportant, that it would be unfair or inappropriate to prosecute the defendant in the case. And prosecutors do that all of the time, and they do it importantly.

[28] And in the Superior Court level, whenever they do it, they file a copy of their administrative decision with the Assignment Judge, that's why I happen to be aware of how many there are, and there are lots and lots and lots of them. Scores of them every month, even in fairly small criminal prosecution counties, such as Morris.

Now, in this case, we did not have a public prosecutor who took an inappropriate hands-off view and said, we just

don't do citizens' complaints. The Prosecutor did take this case. The Prosecutor prosecuted the case at the Municipal Court level, and when an appeal was taken from that, the Public Prosecutor prosecuted the case at the Law Division level. And when that ended with the decision adverse to the State, the Public Prosecutor decided not to go any farther for two reasons, first, because he correctly concluded that there's no such thing as appealing something like this; but, secondly, he concluded, after consulting with the public entity involved; namely, the municipal governing body, that it was not in the public interest to pursue this matter any further, even if it were pursuable. That kind of decision is one that should never be disturbed by a court.

[29] And, indeed, although I indicated previous disappointment with the — I'm not — you know, I have to be cautious, perhaps in some ways overreaching for a Trial Judge to speak of being disappointed with the Supreme Court opinion, so I, you know, I say it, you know, modestly and with some trepidation. But in any event, I did say that about the general opinion.

But *Storm v. Storm*, 141 N.J. 245, decided by the Supreme Court in 1995 did say that when the Public Prosecutor decides to prosecute, he takes over and that his decision should be final. And there cannot and should not be and may not be a private prosecutor in those circumstances.

Well, this is a case where the Public Prosecutor did take the case, and he played it all the way through, and finally decided this is the end. It is not in the public interest to go any further. And within the teaching of *State v. Storm*, that

closes it even if the case is appealed. And then there — so I will just leave it at that.

The case is not appealable and even if it were appealable, this is not a situation where a private prosecutor is appropriate because a public prosecutor has become involved in the case and has made a decision in the public interest with respect to this [30] case. Not a hands-off decision, but a hands-on justice-oriented decision that the case should not go forward.

So I will deny the motion.

And I think Mr. Schechner has submitted a form of order. And to save paperwork, I'll just use his form of order and edit it and sign it right now, if you'll bear with me for a moment.

Okay. Sally, would you please make three copies of this and give one to each attorney.

Thank you.

So if you'll wait just a minute, we'll have that for you.

(Proceedings concluded at 2:21 p.m.)

* * * *

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DATED AND FILED JUNE 30, 2000

SCHECHNER AND TARGAN
80 Main Street
West Orange, New Jersey 07052
(973) 325-2411
Attorneys for Irving D. Isko, a citizen

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MORRIS COUNTY
Criminal Action
Appeal No. 99-074

Civil Action

STATE OF NEW JERSEY

Complainant

vs.

TERRANCE CARLSON AND
JEANNETTE LEEHR

Defendants

ORDER

Motion having been made by counsel for Irving D. Isko for an Order permitting counsel to serve as Special Municipal Prosecutor in this matter and that Motion having duly come on to be heard and after consideration of the Motion and all relevant factors, and good cause being shown for this Order;

Appendix C

It is on this 30th day of June, 2000,

* * *

The motion to appoint David Schechner as special prosecutor is *denied*.

s/ Reginald Stanton
REGINALD STANTON
JUDGE OF THE SUPERIOR COURT
ASSIGNMENT JUDGE

ORAL ARGUMENT WAS HELD.
R.S. A.V.S.C.

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED FEBRUARY 5, 2002. AND FILED FEBRUARY 6, 2002

SUPREME COURT OF NEW JERSEY
C-570 September Term 2001
52,193

STATE OF NEW JERSEY,

Plaintiff,

v.

TERRANCE CARLSON and JEANETTE LEEHR,

Defendants-Respondents.

IRVING D. ISKO,

Appellant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5899-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

Appendix D

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 5th day of February, 2002.

s/ Stephen Townsend
Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — TRANSCRIPT OF PROCEEDINGS DATED AUGUST 11, 1999 AND SEPTEMBER 22, 1999

MENDHAM BOROUGH MUNICIPAL COURT
MORRIS COUNTY, NEW JERSEY

TRANSCRIPT OF PROCEEDINGS

STATE OF NEW JERSEY

vs.

TERRANCE CARLSON and JEANETTE LEEHR,

Defendants.

Place: Mendham Borough Municipal Court
Cherry Lane
Brookside, NJ 07926
Dates: August 11, 1999
September 22, 1999

BEFORE:

HON. VINCENT J. MC MANN, JR., J.M.C.

TRANSCRIPT REQUESTED BY:

POST, POLAK, GOODSELL & MAC NEILL, P.A.

APPEARANCES:

PETER N. GILBRETH, ESQ., Prosecutor for the Borough of Mendham, Attorney for the State

DAVID L. EPSTEIN, ESQ., Attorney for Defendants

Appendix E

* * *

[commencing at page 40]

THE COURT: All right. You know here what I'm required to do is to determine whether there has been a violation of Mendham Borough's zoning ordinance. As such, I'm required to interpret this ordinance. The — for whatever we do here, that should be a centerpiece for my decision. The ordinance in question is found in Article 4 of the Borough of Mendham Zoning Ordinances at Section 215-13. It speaks of the uses permitted in certain residence zones in the community; one being a five acre zone and that would seem to apply to these properties in that I'm told in this Stipulation of Facts that I have that there are twelve acres altogether and one of the lots, Lot 5, has six point nine two acres. So I'm assuming that the ordinance applies to this property, and no one has suggested that it doesn't. The argument is what does it mean with respect to what's happening on this property. It goes on to say that, "No building or land shall be used and no building or structure shall be erected, constituted, reconstructed, altered or [41] repaired which is arranged, intended or designed for any use or occupancy except for the following." (a) speaks in terms of a one single family dwelling. (b) speaks in terms of playgrounds and parks. (c) speaks in terms of agricultural uses. (d) refers to home occupations. (e) talks in terms of accessory uses. And (f) speaks in terms of conditional uses. As I understand the issue before me, it would relate to the interpretation of agricultural uses. Agricultural uses are defined in the ordinance under Section — Article 1, Section 215-1(b). There, agriculture is

defined as the growing of crops, raising or breeding of horses. Those would seem to be key words in connection with this case. But just so it's all read into the record, it goes on to say, "Not only raising or breeding of horses, but sheep, dairy, poultry or other farm livestock, orchard, wood lot, reforestation, nursery or greenhouses or other agricultural purposes. Agricultural land shall include open or wooded areas, ponds, brooks, swamps and meadows." You know, over the years of being a lawyer and those of being a judge, I have learned how we live and breathe based upon the written word. And what are ordinances? How does an ordinance come about? How does a law come about; statute, whatever it may be? You know, someone has some purpose in mind that they are trying to address. And someone sits down and they write about it, here in the form of an ordinance; other places, in the form of [42] statutes. And the individual or individuals who are doing it are trying to use words which express some particular idea which they have in mind. And from there, we grow. In law school, I took the courses which everyone else took, but I took a course entitled, "Legislation" in the Rutgers School of Law down on James Street or Washington Street down in Newark. And I took another course which everyone takes is "Constitutional Law". And in the course in — in Legislation, Mr. Cohen was the professor. I shall always remember him with his bald head except some hair around the sides, a very distinguishing — distinguished looking man, you know, who talked of — in terms of how you determine what the statute meant. And my first day in the class, I said to myself, "Well, what kind of course is this? How do you determine what the statute means or ordinance is, you read it." And then for the next three or four months, whatever a semester of law school takes, I began to learn how you read

those words which seem perfectly clear on their face to indeed imply another meaning altogether than those which seemed so clear to me to begin with. The art involved looking at the legislative history, looking at other sections of the statute, the purpose of it, the intent of the statute, what other laws are on the books. All kinds of things like that could lead one to argue what the statute or the ordinance meant. And indeed, part of the course was to train [43] those people who took it to be able to argue or persuade another as to what that particular statute meant. We do that all the time here in the municipal court. We're so involved in motor vehicle things. For years, people have been telling me what careless driving means and what reckless driving means. No one has stopped trying to tell me what careless driving means and reckless driving means. I marveled at the United States Constitution. I marvel at it today as a lawyer. When I look at all the — could I really cite hundreds of thousands of cases or is that embellishing too much? Is it merely thousands of cases which have been decided, which interpret the United States, you know, Constitution? Names like Marvery versus Madison and things of that nature, if you're a law student. Always loved the Interstate Commerce clause. I really love the Interstate Commerce course — clause because at the time, you know, the United States Constitution was framed, I know we didn't have satellites, I know we didn't have, you know, airplanes. I know we didn't have cars and probably not trains. We didn't have E-mail and electronic devices. But people have been telling us for years what the founders of this country meant with respect to the operation of those kind of things. Trucks traveling from New Jersey to California carrying goods and products and tankers, and they're telling us what those people had decided with respect to those kinds

of activities. [44] I used to marvel at how, you know, someone could tell me that that's what George Washington or someone else, whoever it may be, said that this is what was intended in the year 1999. But they do it every day. Someone says this is what the Interstate Commerce clause meant. This is what the different amendments meant, Fourth Amendment, Fifth Amendment, whatever it is that you want to say written so long ago that probably people never even dreamed or thought about the things which we're asked to interpret today. And I hear, I am certain, that whoever wrote this ordinance never sought — thought for a moment whether we'd — and by the way, these ordinances are so interesting in that I happen to be involved in four municipal courts. So, I'm at least privileged to see the ordinances of four different municipalities. Well, they're alike. They're alike, because there's someone out there who writes these ordinances which are thereafter adopted by a lot of municipalities. And the ones in Chatham probably are not different than the one here, or Mendham Township or whatever it may be. I really doubt that whoever, you know, wrote that ordinance ever thought for a moment that we would be here today hearing Mrs. Leehr's case, who's a lady who owns a piece of property in clearly a residential area of Mendham Township, who has four horses owned by someone else on that property, for which supposedly the person pays nothing, which is hard to believe, but I'm asked to assume that's what [45] happens, and so I do assume for the purpose of this case that's — that's what happens, whether to do that is a violation of the Mendham Borough Zoning Ordinance. Where do you draw the line? Where do you start, where do you stop? There are different ways which, you know, one could approach this matter. The definition of agricultural says raising or breeding

of horses. If you want, you could end your intellectual excursion, you know, right there, because Mrs. Leehr is not raising horses and she's not breeding horses. Is, you know, that the end of it all? Should it be the end of it all? You know, where do you start and where do you stop? Essentially, what we have, you know, here is a residential zone of Mendham. Now, what does that mean? Must we place, you know, limits on what people can do who own, you know, property in a town, you know, such as Mendham? I don't know that we must, but we seem to. Is there a thought that if you own a piece of property, you can do essentially whatever you want with it? It sounds like a nice idea. We can pick extremes. Certainly, someone is not going to allow Mrs. Leehr to develop a nuclear plant on her property, even though she may want to do that. Can she put a circus on her property? I'm sure she can't do that, also, in a residential area. Someone has decided that some part of Mendham is going to be residential. Is it unreasonable? I don't think so. I think it enables all of us, therefore, to live or buy [46] property in an area where we can expect that, you know, certain things, you know, will happen. I've used ridiculous examples, of course, of the circus and the nuclear plant. Of course, they're ludicrous to even suggest those kind of things with respect to this matter. But we can narrow it down. We can get closer, closer and cl[illegible]r and closer, shaving off a little piece here and a little piece there until the distinctions become so difficult to make. Of course, how do we get here, you know, to — when a case like this is involved? We're not allowed to have dogs run in the community. I can't tell you how many times I've seen someone's dog running up and down my street. And I'm the judge in this town and I live in this town. It's a thought that every time I see, you

know, someone else's dog in my backyard, that I should be on the telephone calling the police department and St. Hubert's* to come and arrest someone and pick up the dog. I don't know the answer to those kind of questions. You know, we have here Mrs. Leehr and her horses. Whatever she does apparently offends a neighbor. She might live next to someone else who might not be offended at all. We could take my wife, who's a lady who owns, you know, two horses, and she'd probably welcome Mrs. Leehr over every night and ask her to have coffee with her in the morning and cake with her at night. 'Cause she happens to have some horses on her property, too, my wife probably [47] wouldn't care whether they were Mrs. Leehr's or Mr. Gilbreth's or Mr. Epstein's or whoever they are. And no one would hear, you know, anything more about that, you know. We do have some people who do care apparently and have, you know, voiced their opinions and have raised their voices and asked to be heard, and somehow, that through the municipal official, Mr. Snedeker. We've had in my tenure of six years, we've had other horse cases here. We've even had a duck case or two here. I have in my drawer, which Mrs. Ash chuckles at every now and then, a video and a tape of the ducks quacking. I was asked to decide whether or not we could have ducks quacking. And those were Harding Township ducks, which case was brought here. We've had other horse cases. And indeed, in some respect, I think it's the other horse cases that, you know, causes us to be here — cause us to be here. We had — I had a case — it's another gentleman, a French name, Mr. —

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* Phonetic spelling.

Appendix E

THE CLERK: Des Jardins.

THE COURT: Des Jardins. D E S GA—JARDIN.

THE CLERK: Right.

THE COURT: Close enough, everyone? Mr. DesJardins. Very nice man. I remember he came here. He's a distinguished person, dressed very nicely, cravat of kinds, very distinguished man, owned some property here in Mendham. What he did in his property was he had other people grazing [48] their horses I believe on it. Won't be held here without looking at the transcript to the exact facts, but something along, you know, those lines. He lived in a residential area here of Mendham. The same statute was involved or ordinance was involved. I didn't necessarily decide that case thinking that this case would be here some day. But at least one of the factors in that case that concerned me was what I considered to be the fact that doing that was really not something that was included under the definition of agriculture and beyond that, Mr. DesJardins was doing this in what I considered to be a clearly commercial basis and as I look at this, that's not necessarily the polestar or key to deciding a case of this kind. The word "commercial" in itself isn't the beginning and ending place to this kind of situation. But it was of interest to me in Mr. DesJardins' case and I — I focused in that case at least on giving those particular facts on that aspect of it, that in this residential area, Mr. DesJardins was conducting to me a commercial operation. Now, the word "commercial" is not an offensive word. You know, farming can be commercial. Matter of fact, Mrs. Leehr in here, you know, takes pride that she sold apples for a hundred dollars and

some wood for one thousand six hundred and fifty dollars and something else was sold for a hundred dollars, too, I think. Or maybe it was apples to two people for a hundred dollars. If one is going [49] to do things, which are — they're entitled to in an agriculture area, have sheep and dairy, poultry, I assume that would be of a commercial nature. But those are things which are clearly allowed under the ordinance. So there, the focus isn't necessarily whether it's for money or commercial, and is such commercial; it's because those things are allowed. Mr. DesJardins did not have one of those things and, therefore, the commercial aspect of what he did was of interest, you know, to me. What's of interest in this case is — and as I read the briefs and everything, it seems to me that what someone did was bought my transcript, obtained a copy of it, doesn't matter whether you pay for it or where you got it from or how it happened, read it and then said, "The way to distinguish this case from the DesJardins case is not to charge for whatever the horses do on the property." If I'm going to board horses and I charge someone for them, well, that could be disaster when one reads the DesJardins case. And who knows, of course, if I decided that right to begin with? I decided it as I thought was proper. I still think it's proper. It doesn't mean that different legal dignitaries wouldn't, you know, differ from me. If I had to do it again, I'd do it the same way I did then, for whatever that's worth. But anyway, you know, what someone did here is read that and then here we are. That's at least an impression I have. I always remember a great falldown case [50] we had when I did those kind of things working for an insurance company, and they wrote an opinion on it, and it was a Grand Union case or one of those stores, and in it, the Court noted that the sidewalk was adjacent to the parking lot and there

was a banana on the sidewalk, which looked brown in color, which mean — meant that it had been there for a while and the color of the ground was somewhat brown and the lady fell and slipped on the banana and broke her leg and got thirty thousand dollars. Every time I went to Court thereafter and someone had one of those cases, what I began to hear was someone who was on a sidewalk next to a parking lot which was brown in color with some fruit or banana or something, which was brown in color, also, which would be difficult for someone to see, and they slipped and they fell on it. And if I read — hear the testimony and read the case, it would be the same. And here, what we have is a situation where I'm told that the difference is is that no one's being charged. What's happening, you know, here is that there is a charge of sorts, as Mr. Gilbreth outlined, seven hundred dollars for eating the grass or the hay that's on the property and that's it. And due to my involvement in horses, I can tell you that's a most generous thing. Cause my wife and the two horses, I don't want to begin to tell you what we pay to have those horses just boarded somewhere, never mind all the other things that, you know, come along. [51] And I remember kidding, if I can do so, and maybe someone will criticize me that, I remember when we started this case one day, I kidded Mrs. Leehr as she sat here in the Courtroom. I suggested what a wonderful thing this was to allow someone to have the horses on her property free. And I kiddingly said to her, "I want to get my wife right up there now, so that she can take her two horses over by Mrs. Leehr's house as well and keep them without paying." Where does that all take us? My opinion in reading the stipulated facts is that Mrs. Leehr has four horses boarded at her property, for which I'm told she doesn't charge, and I accept that because I said earlier,

these are the stipulated facts. That's what her lawyer says and Mr. Gilbreth, who's on the side, agrees is the situation. It would be sad indeed if maybe not so, all of that weren't really true at all. Anyway, that is true for the purpose of this case, 'cause that's what I'm asked to assume and so, I do assume it. I just said I do. And for the record, I assume it. And the question is is that okay. If I'm told that Mrs. Leehr got seven hundred and fifty dollars a horse, would it make a difference? Should it make a difference? What if Mrs. Leehr got fifteen dollars for a horse, would it make a difference? Should it make a difference? I don't believe so. If it was one horse instead of four, would it make a difference? If there were fifteen horses instead of four, would it make a difference? If Mrs. [52] Leehr were breeding horses on her property, would it and should it make a difference? Almost not what it matters, but what's the concern of the neighbor? If Mrs. Leehr were breeding fifteen horses on the property, would someone be here in Court? If she were boarding one horse on the property or four horses, would she be here in Court? Yes. And we are here in Court, 'cause there are four horses being *breeded*, you know, on the property. Suppose she had twenty-five sheep running back and forth? Suppose she had a hundred and fifty chickens floating around, cackling, 'cause that's what chickens do? They don't quack like the ducks. Laying eggs; whatever else they do. What would someone — someone think of that? I don't know. Must I and should I draw a line? I guess so. I'm looking at the Interstate Commerce clause. I say that jokingly. With satellites that never existed back at the time the Constitution was framed, I'm asking whether I need to and should regulate them, and airplanes, and large trucks. Well, they weren't included, boarding of the horses, in the ordinance. If the

people who wrote it had it to do over again, would they? Would someone have said, "Hey, let a lady have four horses on her property rather than a hundred and fifty chickens." or whatever else it is; twenty-five sheep or whatever it may be? I don't know. Anyway, someone did not include boarding of horses. Can that kind situation be corrected in a town like Mendham [53] if it has to be? Yes, it could — could be. People in Mendham could amend their ordinance so that it said boarding of horses would be okay. If it's not allowed, can Mrs. Leehr do something further? Yes, I imagine she could. She could ask for a variance so she could board horses if she, you know, wished to do that. And maybe someone would say, "What's the difference between raising fifteen horses and boarding four?". Of course, if you can board four, you can board twenty-four, whatever it may be. But anyway, the ordinance does not talk in terms of boarding, you know, horses. It is a residential area. Someone has decided that in some sense, it must — by some definition, it must remain a residential. And now, I'm very interested in what I say and do in these kind of cases because I realize that whatever I do in this case, someone will probably buy a transcript and then we'll have another case. So I need to be concerned, you know, here about what I say and what I do, because if I were to say — to tell Mrs. Leehr that this would be all right, then what have I got next week? Okay. Ten more homes with people having ten horses on each, all telling me that they don't charge for them so it's okay and now, we got ten homes with ten people boarding horses. The ordinance does not say, you know, boarding horses. It speaks of breeding of horses and raising of horses and it doesn't talk in terms of boarding horses. So I, therefore, conclude whether or not [54] Mrs. Leehr accepts money for what she does with the

horses or doesn't, I don't see any difference. It's a notion of the fact that she is boarding the horses, which is not something included in the ordinance, not a permitted use, and it's the notion that if I do that here, that that can be an established use in this residential zone in Mendham. It doesn't offend me particularly as an individual. It certainly wouldn't offend Mrs. McMann. But that's not, you know, what's permitted. If someone wants to do that, then the ordinance should be changed to allow it. And since it's not allowed in my opinion, I find that Mrs. Leehr and Mr. Carlson have, in fact, violated the ordinance. So having found that, I'm going to do this. I'm going to fine each — Mrs. Leehr and Mr. Carlson fifty dollars each, and there'll be twenty-five dollars in Court costs. And I'm going to direct that Mrs. Leehr and Mr. Carlson have those horses removed from the property, but I'm going to give them ninety days to have the horses removed. Now, that period can be used by Mrs. Leehr and Mrs. Carlson as — Mr. Carlson as they wish. They can take an appeal from my decision, if that's something they wish to do. And/or perhaps maybe they would like to petition the Borough Council for — to amend the ordinance and/or perhaps grant a variance or do whatever they wish to do in the ninety day period. The end of the ninety days, the horses must be out of there. I am not telling [55] someone that I will entertain a further extension of that situation and just because I make an example doesn't mean that if I had the exact situation before me that I would do something different with it. But if I were told, for example, that an application for a variance had been made and it was within several weeks of being decided or there was a good indication that it would be changed, if someone came back to me, then I might consider extending the time period. Having said that

doesn't mean that I will or must. But at any rate, if there's something that really would require a further extension, I'll at least be amenable to hearing such an application. But it will have nothing to do with, you know, changing my decision. What I've said stands. All right. There being no other matters before the Court, the Court is adjourned.

* * * *

APPENDIX F — TRANSCRIPT OF MUNICIPAL APPEAL OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DATED MAY 12, 2000

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO.
APP. DIV. NO.

STATE OF NEW JERSEY,

Complainant,

vs.

TERRANCE CARLSON,

Defendant.

TRANSCRIPT
OF
MUNICIPAL APPEAL

Place: Morris County Courthouse
Washington and Court Streets
Morristown, New Jersey 07963

Date: May 12, 2000

Appendix F

BEFORE:

HONORABLE N. PETER CONFORTI, J.S.C.

TRANSCRIPT ORDERED BY:

THOMAS J. MALMAN, ESQ. (Pitney, Hardin, Kipp & Szuch)

APPEARANCES:

UNIDENTIFIED ATTORNEY,
Attorney for the Borough of Mendham

UNIDENTIFIED ATTORNEY,
Attorney for Defendant.

[commencing at page 2]

THE COURT: Probably the most interesting appeal I've had all year.

We're dealing with the Borough of Mendham zoning residence for a five-acre residential zone, as I understand it, that permits agricultural uses, and we have, in terms of the relevant facts, stipulated facts that were presented to the municipal court judge when he had this matter before him. The initial date was the 11th of August last year, and then I believe the actual trial or decision occurred on the 22nd of December of last year.

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The question concerns within the definition of "agricultural uses," the raising and breeding of horses. The property owner Mr. Carlson having — I don't think there's any dispute, but that he has a five-acre — at least a five-acre lot. And there's a barn on the property that can house four horses, if I'm not mistaken. And in that barn are the horses of a party named Thomas, last name, not the horses of the property owner.

And the Borough of Mendham, through their zoning officer, notified Mr. Carlson and his wife that they were in violation of the ordinance, the zoning ordinance, with regard to these horses being located on that property. The lot is — for the record, is noted [3] in the stipulation, 5.01; that is an area of land of 5.004 acres. And under the stipulation at Number 3, it contains a barn and fenced-in pasture area that existed at the time the defendants purchased the property. And I guess the former owner was the party who appeared in the municipal court previously when there was a conviction of a violation of the zoning ordinance. I think it's the same piece of property, is it not?

DEFENDANT'S ATTORNEY: Yes, Your Honor.

THE COURT: The barn is stipulated to be designed for the keeping of horses and is several decades old, under Paragraph 3.

The interesting aspect of the stipulation to me, in terms of interpreting the ordinance, is Number 7; wherein the parties stipulate:

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The horses are allowed to remain at the barn free of charge; however, the owner does reimburse the defendants for grazing and haying at the property, to the extent that the horses do eat the grass and hay found at the property.

And in the appendix that was submitted, I believe there is a copy of a receipt from this property owner with regard — or from — yeah, from the property owner, the defendant, to Mr. Thomas, concerning $700, if I'm not mistaken, that was paid for the horses [4] eating the grass and hay on this particular property. And it is stipulated between the parties that the property owner is not charging the Thomas — Ms. Thomas for the horses being able to utilize the barn.

That's a distinction in my judgment, in terms of what occurred with regard to the former case, where there was an acknowledgement of the property owner charging for horses utilizing the barn. Why do I say that's a distinction?

This particular case involves this property owner, Mr. Carlson, having these horses on his property. And what are the horses doing besides being there? They're eating the hay and the grass. What does that involve — and I'll direct my inquiry to the attorney for the borough — if not, an agricultural use with regard to this property? Because the first aspect of the definition of agricultural use is the growing of crops.

BOROUGH ATTORNEY: I would say, Your Honor, it doesn't fall under an agricultural use.

THE COURT: Why no?

BOROUGH ATTORNEY: Because — well, I guess the defendant has also submitted farmland assessment applications stating that — I'm going back just to your prior inquiry — stating that they received [5] payment for the boarding of the horses. But —

THE COURT: It's stipulated before me though, as in this dispute between the borough and the defendant, that there's no money being exchanged with regard to the Thomases having —

DEFENDANT'S ATTORNEY: Well — I'm sorry, Judge.

THE COURT: Don't fall on the job here.

DEFENDANT'S ATTORNEY: This is a low table. Actually, the horses are now gone, but there were four, all of four.

THE COURT: There were four.

DEFENDANT'S ATTORNEY: That's correct.

THE COURT: A barn that houses four horses.

DEFENDANT'S ATTORNEY: Yeah.

THE COURT: So the citizen who is the neighbor, who's complaining about traffic being in the area, we can't have 50 horses there; we can only have 4 horses, and one property owner and one party who owns those horses, those four horses.

I understand the citizens' concern. Okay? This is a five-acre residential zone. They don't want traffic going back and forth. I understand that completely. But I'm talking about the interpretation of this particular ordinance, in which these horses are [6] eating the grass and the hay that are being raised by the property owner on their land.

BOROUGH ATTORNEY: Well, Your Honor, I don't believe — to answer your question, I don't believe that really falls under growing of crops. I mean, this isn't a farm, there's no primary use where they're growing crops or selling crops. You know —

THE COURT: Let me ask you another question. Suppose the Thomases sold their horses to —

BOROUGH ATTORNEY: The propert, owner?

THE COURT: — Mr. Carlson. You wouldn't be in here, would you? You wouldn't be issuing a summons against them.

BOROUGH ATTORNEY: No, we wouldn't, Your Honor.

THE COURT: Let's say they sold two of the horses and they kept two of the horses. Are you going to prosecutor Mr. Carlson?

BOROUGH ATTORNEY: Technically, they're in violation of the ordinance.

THE COURT: Why are they in violation of the ordinance?

BOROUGH ATTORNEY: Because they would still have boarding of horses.

THE COURT: How would they have boarding of [7] horses when you stipulated that they were not paying rent?

BOROUGH ATTORNEY: Well, I think it's more of a barter exchange, and I —

THE COURT: Your burden is beyond a reasonable doubt as to the elements of the offense.

BOROUGH ATTORNEY: But, in essence, Your Honor, there is — they don't own the horses and they don't —

THE COURT: I know they don't own the horses.

BOROUGH ATTORNEY: So the horses are there, they're someone ele's horse —

THE COURT: Right.

BOROUGH ATTORNEY: — so that other person has the ownership.

THE COURT: Don't you think that's a little arbitrary in terms of interpreting this ordinance; that if two of the horses are owned by Mr. Carlson and two horses are owned by

Ms. Thomas? How is that property owner supposed to know that he's in violation of his ordinance when all of these horses are out there eating his hay and grass?

BOROUGH ATTORNEY: Because there's a big distinction between boarding and owning and raising horses.

[8] THE COURT: Where did we get involved in boarding in this case when you stipulated no boarding, they're there free?

BOROUGH ATTORNEY: I don't — I don't really believe, Your Honor, that we stipulated it in the sense that they're not boarding. They actually said they don't own the horses and they're there, and there's an exchange or an arrangement going on where, in effect, the property owner is receiving a benefit for someone else's horses being there. So that's a boarding of a horse.

THE COURT: The property owner is receiving the benefit of those horses eating what he's producing, which is clearly an agricultural use.

BOROUGH ATTORNEY: But they —

THE COURT: The case that you cited that *Demarest* case by the great Judge Goldman of our Appellate Division, he clearly talks about agriculture being production of products, agricultural products. That's what's happening here.

BOROUGH ATTORNEY: But they haven't demonstrated that they're producing any type of product though.

THE COURT: They're eating the hay, you stipulated to that.

[9] BOROUGH ATTORNEY: But the —

THE COURT: That hay is being grown by Mr. Carlson.

BOROUGH ATTORNEY: The property owner isn't in the business of selling or producing that hay. Their primary use of the property is residential and they're boarding these horses there. I don't — if they were —

THE COURT: You've got a problem with the stipulated facts here, in my opinion. You stipulated to these facts, that there was no — they were there free of charge and these horses were eating his hay and grass. That's the facts that are before this Court. And your burden is to prove beyond a reasonable doubt the elements of this offense. That's clear from Judge Pressler's opinion, I think the *Schabb* decision (phonetic).

BOROUGH ATTORNEY: That's correct, Your Honor.

DEFENDANT'S ATTORNEY: If I may —

THE COURT: You tell — in my judgment, that's a consistent interpretation of this ordinance. How else is a property owner to know how he would be in violation of this ordinance from language of this ordinance. There's nothing wrong with — you know, if [10] Mendham wants to change their ordinance, they can clearly do that in the manner in which you seek to have the Court interpret the ordinance. They can do that, but not under the language of this ordinance.

And this does not conflict with the decision of the municipal judge in that prior case, where it was acknowledge that, indeed, the property owner was renting out his barn, a commercial use. And it's consistent with Judge Goldman's decision, in terms of the boarding of horses as not being an agricultural use.

Somebody wants to give you help.

BOROUGH ATTORNEY: Yeah.

(Counsel confer)

BOROUGH ATTORNEY: Your Honor, may I just have one moment?

THE COURT: Sure.

(Counsel confer)

DEFENDANT'S ATTORNEY: Your Honor, just for the record, I don't know if I should be objecting to the private citizens, neighbors —

THE COURT: It's a 20-second time out.

DEFENDANT'S ATTORNEY: Yeah, that's all right. Advising the State on how to prosecute.

BOROUGH ATTORNEY: Your Honor, I won't say [11] anymore. But, Your Honor, just if I may have an opportunity to respond.

THE COURT: Go ahead.

BOROUGH ATTORNEY: Again, we really do feel that it was a barter situation. And as far as the stipulation is concerned, please keep in mind that, yes, if the horses were helping them to produce crops that were ultimately for sale in a farming-type operation, that would be a different situation.

THE COURT: Can't have a farm stand there.

BOROUGH ATTORNEY: It's not a farm, just a farming-type operation. There's no other opportunity —

THE COURT: Raising of hay.

BOROUGH ATTORNEY: But they're not —

THE COURT: Do you mean to tell me that people who live in that area who enjoy the benefits of farmland assessment, do you think they would disagree with me that the raising of hay is an agricultural pursuit?

BOROUGH ATTORNEY: But that's not the primary — that's not the use on the property, Your Honor. The only — if with the stipulation —

THE COURT: What do you mean it's "not the use"? Clearly, in this particular zone agricultural [12] use is permitted. Raising of hay.

BOROUGH ATTORNEY: But that's not the activity going on at this property. There is no evidence and it's not —

THE COURT: You stipulated that that's what those horses were doing.

BOROUGH ATTORNEY: There wasn't any sale of crops or production of crops. It's just —

THE COURT: I'm sorry, but the record clearly reflects that Mr. Carlson received $700 from Ms. Thomas with regard to the horse — the horses, I guess, grazing on the land.

The problem that Mendham has, in my judgment, is the stipulation of facts that they presented, which is the record the Court has to go on here. And I would suggest, even stating that problem, that under the facts of this particular case, that's the only consistent interpretation of this ordinance that makes any sense because, otherwise, he's going to stand up and say, this is an arbitrary interpretation of this ordinance, and he's got a good point.

If Mendham — if the town fathers wish to amend the ordinance in the manner in which you seek to assert it should be interpreted, they can do that, it seems to me.

[13] BOROUGH ATTORNEY: But, on the other hand, Your Honor, if the applicant wanted to make an application for a use variance to comply with the way this has always been — the way the ordinance has always been applied, they could do so. Our neighbor, the Township of Mendham, has —

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THE COURT: I'm not so sure that they have to under the stipulated facts that I have before me in this record.

BOROUGH ATTORNEY: Well, there are some real concerns and there are quite a few — like, for an example, the borough neighbor Mendham Township has a boarding — an ordinance which permits boarding in a zone with many restrictions and concerns.

THE COURT: Okay.

BOROUGH ATTORNEY: Here, this is just leaving it wide open, so that he could board, under this arrangement —

THE COURT: But there's nothing that prevents the town fathers of the Borough of Mendham from reviewing the ordinance, changing the ordinance. You know the procedure that they have to go through.

BOROUGH ATTORNEY: I understand.

THE COURT: And the community, the citizens of the borough, have the right to have input into any [14] amendment that would be sought. But under —

BOROUGH ATTORNEY: But, Your Honor, if I could, just one final thought; and, that is, that stipulation was obviously to spare the Court some time. And, yes, we agreed to it. But the substance of it, more than the actual form, was that it was really understood that they were — those were not their horses, there was an arrangement made. And rather

than to go through all such testimony and to really get to the point that the horses were being boarded there in exchange for —

THE COURT: I'm not going to speculate on what the hearing would have produced by way of testimony. All I'm indicating to you though is my interpretation of the ordinance from these facts would suggest this is an interpretation that advised a landowner within this particular zone what that landowner can and cannot do. Okay?

And it's consistent with the decision of the municipal court judge for the previous property owner who did acknowledge the actual boarding of horse, receiving rental income with regard to that activity.

BOROUGH ATTORNEY: But under that stipulation, Your Honor, even with that arrangement, [15] it's a very distinguishable activity when it's someone else's horses. And that's what we tried — that's even what the Court said in the *Demarest* case, that there's other activities —

THE COURT: *Demarest* was clearly a stable operation, as Judge Goldman pointed out. There were not agricultural pursuits. Here, in my judgment you've stipulated that there are.

All right. I will ask you to prepare a judgment to reverse the conviction. And I know the wife did not appeal.

DEFENDANT'S ATTORNEY: I think they both did, Your Honor. In fact, she's here now. I think that was on behalf of both, Your Honor.

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THE COURT: Well, I don't — I do not — you check the notice of appeal. But, in any event, I would reverse the conviction for the husband and the wife.

DEFENDANT'S ATTORNEY: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded)

* * * *

APPENDIX G — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY REVERSING CONVICTION DATED AND FILED MAY 22, 2000

POST, POLAK, GOODSELL & MacNEILL, P.A.
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 994-1100
Attorneys for Defendant/Appellant,
Terrance Carlson and Jeanette Leehr
Our File No. 3219.01

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY

Criminal Action (Municipal Appeal)

APPEAL NO. 99-074

STATE OF NEW JERSEY,

Plaintiff/Respondent,

vs.

TERRANCE CARLSON AND JEANETTE LEEHR,

Defendant/Appellant.

Appendix G

On Appeal From The Municipal Court of the Borough of Mendham

Municipal Court Complaint Nos. B000055 and B000056

Sat Below: Honorable N. Peter Conforti

ORDER

This matter having been brought before the Court on the appeal of defendants Terrance Carlson and Jeanette Leehr from the Municipal Court of the Borough of Mendham, seeking a reversal of the convictions against the defendants entered on Municipal Court Complaint numbers B000055 and B000056 and the Court having conducted a trial *de novo*, and the Court having reviewed the transcript of the proceedings and the record, before the Municipal Court of Mendham, and the Court having reviewed the Briefs submitted by defendants and the State herein, and the Court having heard argument of counsel in open Court on May 12, 2000 (Fred C. Semrau, Esq. appearing for the State, and David L. Epstein, Esq., appearing for defendant), and the Court having rendered its decision and findings on said date, and for good cause having been shown,

IT IS, on this 22nd day of May, 2000, **ORDERED** as follows:

1. Defendants' convictions for alleged violations of the Mendham Borough Zoning Ordinance, under Borough of Mendham Municipal Court Complaint numbers B000055 and B000056, be and are hereby **reversed**.

2. The Clerk of the Mendham Borough Municipal Court shall promptly refund defendants for the fines that were imposed upon and paid to the Mendham Borough Municipal Court ($50.00 for each defendant) and for Court costs that were imposed upon and paid to the Mendham Borough Municipal Court ($50.00 for each defendant).

3. A true and correct copy of this Order shall be served upon the Morris County Prosecutor, The Mendham Borough Municipal Court and the prosecuting attorney for The State (Borough of Mendham) within 7 days hereof.

s/ N. Peter Conforti, J.S.C.
Honorable N. Peter Conforti, J.S.C.